

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

JANUARY TERM, 1929

No. 4903.

643

ARTHUR D. HAYDEN, APPELLANT,

vs.

INTERNATIONAL BANKING CORPORATION.

**APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.**

FILED JANUARY 9, 1929.

PRINTED FEBRUARY 18, 1929.

Court of Appeals of the District of Columbia

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No. 4903.

ARTHUR D. HAYDEN, APPELLANT,

vs.

INTERNATIONAL BANKING CORPORATION,
APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia

No. 4903.

ARTHUR D. HAYDEN, Appellant,

VS.

INTERNATIONAL BANKING CORPORATION.

a Supreme Court of the District of Columbia.

At Law.

No. 71899.

INTERNATIONAL BANKING CORPORATION, Plaintiff,

VS.

ARTHUR D. HAYDEN, Defendant.

UNITED STATES OF AMERICA,

District of Columbia, ss:

Be it remembered that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above entitled cause, to wit:

1 *Declaration.*

Filed August 17, 1926.

In the Supreme Court of the District of Columbia.

At Law.

No. 71899.

INTERNATIONAL BANKING CORPORATION, Plaintiff,

V.

ARTHUR D. HAYDEN, Defendant.

The plaintiff sues the defendant for that:

1. The defendant, on the 15th day of November, 1920, by his promissory note now overdue, promised to pay to the

plaintiff \$7,456.89 with interest at 8 per cent per annum, on demand, but did not pay the same, although the plaintiff has frequently demanded payment. And the plaintiff claims \$7,456.89, with interest thereon at 8 per cent per annum from November 15, 1920, besides costs.

2. For money payable by the defendant to the plaintiff; for goods sold and delivered by the plaintiff to the defendant; for work done and material provided by the plaintiff for the defendant at his request; for money lent by the plaintiff to the defendant; for money paid by the plaintiff for the defendant at his request; for money received by the defendant for the use of the plaintiff; for money found to be due from the defendant to the plaintiff on accounts stated between them. And the plaintiff claims \$7,456.89, with interest at 8 per cent per annum from November 15, 1920, exclusive of all set-offs and just ground of defense, besides costs.

F. W. CLEMENTS,
LAWRENCE H. CAKE,
Attorneys for Plaintiff.

2

Particulars of Demand.

Arthur D. Hayden to International Banking Corporation,
Dr.

To amount due from Arthur D. Hayden to International Banking Corporation on a certain promissory note of Arthur D. Hayden, dated November 15, 1920, in favor of Fidelity-International Trust Company, for \$7,456.89, with interest at 8% per annum, the said promissory note having been endorsed and delivered to the said International Banking Corporation which is now the owner and holder thereof... \$7,456.89

With interest thereon at 8% per annum from November 15, 1920.

Pleas.

Filed November 3, 1926.

* * * * *

1. For a plea to the first count of the declaration filed herein this defendant says that the cause of action set

forth therein did not accrue within three years next preceding the filing thereof.

2. For plea to the second count of the declaration filed herein this defendant says that the cause of action set forth therein did not accrue within three years next preceding the filing thereof.

MINOR, GATLEY & ROWLAND,
By HUGH B. ROWLAND,
Attorneys for Defendant.

3

Replication.

Filed November 9, 1926.

* * * * *

Now comes the plaintiff and for replication to the defendant's pleas says:

1. The defendant has, within three years next preceding the filing of the declaration herein, acknowledged in writing the said indebtedness and promised to pay the same.

2. At the time the cause of action accrued the defendant was out of the District of Columbia, and did not return to or reside in the District of Columbia until within three years next preceding the filing of the declaration herein.

F. W. CLEMENTS,
LAWRENCE H. CAKE,
Attorneys for Plaintiff.

Memorandum.

November 22, 1926.—Joinder of Issue filed.

Stipulation as to Facts.

Filed October 8, 1928.

* * * * *

The plaintiff and the defendant herein, by their respective attorneys, stipulate that the issues joined in this cause may be tried by the Court without a jury.

Said parties further stipulate that the correspondence of which copies are attached hereto and made part of this

stipulation passed between the plaintiff and the defendant concerning the subject matter of this suit, each of the letters in said correspondence having been written and
4 mailed at or about the date appearing upon it and received by the addressee thereof soon thereafter. The letters addressed to the defendant, upon some of which the signature is lacking, are copied from the retained copies of the plaintiff and were signed by or on behalf of the plaintiff by an officer or agent of the plaintiff, excepting the letter dated December 28, 1925, which was signed by the attorneys for the plaintiff. The letters purporting to be signed by the defendant were signed by him.

This correspondence may be considered as offered in evidence on behalf of the plaintiff, as a whole, and severally, and objected to on behalf of the defendant, on the ground that neither the correspondence as a whole nor any part of it proves or tends to prove that the defendant acknowledged the indebtedness sued for or promised to pay the same, in writing, within three years of the bringing of the suit, as is claimed by the plaintiff, and this stipulation shall not be considered as a waiver on the part of the defendant of this objection to the consideration of said letters by the court.

Neither the plaintiff nor the defendant have other evidence to offer and announce their respective cases closed, excepting for the production for filing in this cause by the plaintiff of the original note.

LAWRENCE H. CAKE,

Attorney for Plaintiff.

MINOR, GATLEY & DRURY,

By ARTHUR P. DRURY,

Attorneys for Defendant.

5

The Explorers Club.

New York, 47 West 76th Street, June 7th.

DEAR MR. JAY:

Here I am but, I regret to say, too late to find you at your office as I have been looking forward to doing ever since I wrote you. I may return again before the first and

I will try and get in touch with you as soon as I do, remaining,

Very truly yours,

ARTHUR D. HAYDEN.

Lawrence M. Jay, Esq., Vice President, International Banking Corporation.

November 9, 1920.

Mr. Arthur D. Hayden,
% Yale Club,
Vanderbilt Av. & 44th St.,
New York City.

DEAR SIR:

We enclose herewith our demand note for \$7,456.89, dated November 15, 1920, which we will appreciate your signing and returning to us at your earliest convenience.

This is to cover two demand notes of \$6,511.33; and, in addition, interest due of \$945.56.

Kindly note the interest is at the rate of eight per cent.

Yours very truly,

_____,
Assistant Secretary.

6

June 5, 1925.

Mr. Arthur D. Hayden,
% Princeton Club,
86 Park Avenue,
New York City.

DEAR SIR:

With reference to your demand note dated November 15, 1920, for \$7,456.89 and interest, will you please advise us what the prospects are of your making a substantial payment on account.

Yours very truly,
(Sd.)

G. H. McKAY,
Auditor.

GHM:WW.

Duplicate.

International Banking Corporation, 36, Bishopsgate,
London, E. C. 2.

PJR/HLP.

20th August, 1925.

Arthur D. Hayden, Esq.,
Hotel de Gibraltar,
35, Rue de Syrie,
Paris.

DEAR SIR:

We are requested by our New York friends to forward you the enclosed copy of their letter of the 5th June last, to which, they state, no reply has been received, probably on account of the fact that the original may have miscarried.

Will you be good enough to acknowledge receipt.

I am, dear Sir,

Yours faithfully,

_____,
Manager.

7 Santa Cruz de Tenerife, September 17, 1925.

International Banking Corporation,
60 Wall Street,
New York, N. Y., U. S. A.

DEAR SIRS:

I am in receipt of a copy of a letter written me by you under date of June 5th and forwarded by your London Branch, the original having not yet reached me, asking me to advise you what the prospects are of my making a substantial payment on account in connection with your loan to me, amounting to six thousand odd dollars rather than \$7,456. 89 as quoted in your letter, according to my recollection, secured by Seoul Mining Stock and in reply I beg to say that I am not in a position to do more than abide by the understanding arrived at at the time of the consumation of this loan originally and which was for the paying off of the loan by the application of the entire dividends received

from the stock until such time as the loan might be liquidated.

Yours very truly,
(Sd.)

ARTHUR D. HAYDEN.
ARTHUR D. HAYDEN.

October 16, 1925.

Mr. Arthur D. Hayden,
Santa Cruz de Tenerife,
Canary Islands.

DEAR SIR:

With reference to your letter of September 17, we were much surprised at your statement regarding the payment of your loan. There is, of course, no basis for your contention, which carries its own answer, as no bank would make a loan under such conditions as you name.

Regarding the amount, you have apparently forgotten you gave a new note which included \$1,456.89 interest.

Unless you are prepared to make a payment on account we shall be obliged to hand the note to our lawyers for collection.

Will you please let us hear from you by return mail.

Very truly yours,

GHM:WR.

_____,
Auditor.

8 Copy to A. D. Hayden, c/o Princeton Club, 86
Park Ave.,

December 8, 1925.

Mr. Arthur D. Hayden,
c/o Brown Shipley & Co.,
123 Pall Mall,
London, England.

DEAR SIR:

As we have not received a reply to our letter of October 16, we enclose a copy.

Very truly yours,

GHM:WR.

_____,
Auditor.

L.H.C.

Dec. 28, 1925.

Arthur D. Hayden, Esq.,
Metropolitan Club,
Washington, D. C.

DEAR SIR:

We have received from our correspondents in New York instructions to take action for the collection of your promissory note in favor of the Fidelity-International Trust Company for \$7,456.89. Although the note is a demand note and we understand efforts have already been made by the holder to induce you to pay it, without success, we do not wish to take action without first notifying you that payment is demanded and expected and without giving you an opportunity to call on us with a view to prompt payment.

Please let us hear from you at the earliest convenience.

Yours truly,

— — —

9 The Princeton Club of New York.

January 4, 1926.

Messrs. Britton and Gray,
Attorneys and Counsellors at Law,
Washington, D. C.

DEAR SIRs:

I have received your letter of the 26th ultimo this morning and have already wired you that I am writing.

You write of a note of mine in favor of the "Fidelity-International Trust Company" and I can only say I know of no transaction on my part with this Company.

On the other hand the International Banking Corporation does hold a note of mine for approximately the amount you mention and I also find some letters and copies of letters from them—some of which are many weeks old—much of my mail seeming to have been chasing me back and forth across the Atlantic and as far west as the Pacific Coast—and I dare say it is the Internationaal Banking Corporation's note meant in your letter—if this is the case I beg to advise you that I am calling upon them today with regard to same and that my best address is as above.

Very truly yours,

ARTHUR D. HAYDEN.

10

January 6, 1926.

Mr. Arthur D. Hayden,
Princeton Club,
86 Park Ave.,
New York City.

DEAR SIR:

With reference to our telephone conversation, I enclose copy of a letter dated November 9, 1920 which will probably refresh your memory in connection with note for \$7,456.89.

Yours very truly,

Auditor.

GMcK.mp.

International Banking Corporation, New York.

Jan. 19, 1926.

Memorandum for

Mr. Arthur D. Hayden,
Princeton Club,
86 Park Ave., New York City.

DEAR SIR:

Will you please come in and see me at your early convenience?

Very truly yours,

Auditor.

11

The Princeton Club of New York.

Jan. 20, 1926.

Mr. G. H. McKay,
Auditor International Banking Corp.,
City.

MY DEAR MR. MCKAY:

I have found both your phone message of the 13th and your note of yesterday on my return to the city this evening from Worcester where I was suddenly called in connection with a matter of importance.

I shall ring you up tomorrow and shall hope to see you
sometime during the day and I am,

Faithfully yours,

ARTHUR D. HAYDEN.

247 West State Street, Trenton, N. J.

Jan. 28, '26.

Mr. G. H. McKay,
Auditor International Banking Corp.,
60 Wall Street,
New York, N. Y.

MY DEAR MR. MCKAY:

Just a few lines to tell you that, after having come over here for the week end, I am still laid up with what seems to be a mild case of "Flu" but in the mean time I am continuing my efforts toward the consum-ation of a sale of property which, if consum-ated, will simplyfy my position considerably.

I- any event I shall call upon you at your office on my return to New York with the object of arranging with you about my note on the best terms possible, my address in the mean time being c/o James B. Breese, Esq., Trenton, N. J., remaining,

Faithfully yours,

ARTHUR D. HAYDEN.
ARTHUR D. HAYDEN.

February 18, 1926.

Mr Arthur D. Hayden,
Princeton Club,
86 Park Ave.,
New York City.

DEAR MR. HAYDEN:

Referring to your letter of January 28th, I have been expecting to see you before this, and hope your not having been in does not indicate that you are still laid up with the "Flu."

Will you please let me hear from you by an early opportunity.

Very truly yours,

Auditor.

GHM:WR.

Trenton, N. J., Feb. 23, '26.

Mr. G. H. McKay,

Auditor International Banking Corporation,

60 Wall Street,

New York, N. Y.

DEAR MR. MCKAY:

I have your letter of the 18th instant, asking when you may expect to receive my promised call with regard to my note and in reply I can only say that I shall drop in to see you as soon as I return to the city.

I have been, and am still, all out of sorts and can't seem to find out just what the matter is though it seems to be some sort of a malaria. I seem unable to ever get enough sleep, seem "all in" all the time but in the meantime I'm working constantly to get my things lined up, so that this is really not time lost and I constantly look forward to my return to New York, remaining, meantime,

Faithfully yours,

ARTHUR D. HAYDEN.

ARTHUR D. HAYDEN.

13

May 17, 1926.

Mr. Arthur D. Hayden,

Princeton Club,

86 Park Avenue,

New York City.

DEAR MR. HAYDEN:

With reference to your letter dated Trenton, February 23, 1926, which is the last we have received from you, would you please call upon us or let us hear from you by an early opportunity.

Yours very truly,

GMcK.mp.

Vice-President.

Trenton, N. J., May 22, 1926.

Mr. L. M. Jay,
Vice-President International Banking Corporation,
60 Wall Street,
New York, N. Y.

DEAR MR. JAY:

I have your letter of the 17th instant, forwarded here, and in reply I beg to say that I shall call in to see you as soon as I can get over to New York which I expect will be not later than the first week in June, remaining, in the meantime,

Very truly yours,

ARTHUR D. HAYDEN.
ARTHUR D. HAYDEN.

Court's Finding.

Filed October 11, 1928.

• • • • *

The issues joined in this case were tried and determined by the Court without the intervention of a jury pursuant to stipulation in writing of the parties by their attorneys waiving a jury, and the facts relevant to the determination of said issues having been agreed by the stipulation filed herein, the Court finds and determines as a matter of law, from said agreed facts, that the defendant within the three years next preceding the filing of the declaration herein did so acknowledge the indebtedness to recover which this action was brought, as to take the case out of the operation of the statute of limitations. Judgment will therefore be entered for the plaintiff in the sum of \$7,456.89, with interest at 8% per annum thereon from November 15, 1920 until paid.

WENDELL P. STAFFORD,
Justice.

O K as to form.

MINOR, GATLEY & DRURY,
Attys. for Defendant.

Supreme Court of the District of Columbia.

Thursday, October 11th, 1928.

Session resumed pursuant to adjournment, Hon. Wendell P. Stafford, Justice, presiding.

* * * * *

Come now the parties hereto, by their respective attorneys of record and thereupon the plaintiff by its said attorneys moves for judgment in accordance with the finding of the court, filed herein this 11th day of October 15 1928, and it is accordingly so ordered.

Wherefore, it is considered that plaintiff recover of the defendant herein, the sum of Seven Thousand Four Hundred Fifty-six and 89/100 Dollars (\$7,456.89), with interest thereon, from the 15th day of November, 1920, at eight per centum (8%), per annum until paid, together with costs of suit to be taxed by the clerk and have execution thereof.

From the foregoing judgment, the defendant by his said attorneys, in open court, notes an appeal in open court and upon motion that bond for costs on appeal be fixed, it is ordered that the maximum of an undertaking therefor be fixed in the sum of One Hundred Dollars, with leave to deposit the sum of Fifty Dollars, with the clerk, in lieu thereof.

Memorandum.

October 29, 1928.—Undertaking on Appeal approved and filed.

Assignments of Error.

Filed October 30, 1928.

* * * * *

The Court erred in holding as a matter of law, from the agreed facts, that the defendant within three years next preceding the filing of the declaration herein did so acknowledge the indebtedness to recover which this action was brought, as to take the case out of the operation of the statute of limitations.

The Court erred in entering judgment for the plaintiff.
 MINOR, GATLEY & DRURY,
Attorneys for Defendant.

16

Received copy October 29, 1928.

PAUL E. LESH,
Attorney for Plaintiff.

Designation of Record.

Filed October 30, 1928.

• • • • *

The Clerk will please prepare transcript of record on appeal in the above case and include therein the following:

1. Declaration and particulars of demand.
2. Plea of Defendant.
3. Replication to plea.
4. Memorandum Joinder of Issue.
5. Stipulation waiving jury trial and agreed facts.
6. Finding of Court.
7. Judgment.
8. Memo. Appeal noted and perfected.
9. Assignments of Error.
10. This Designation.

MINOR, GATLEY & DRURY,
Attorneys for Defendant.

Received copy October 29, 1928.

PAUL E. LESH,
Attorney for Plaintiff.

17 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 16, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 71899 at Law, wherein In-

ternational Banking Corporation is Plaintiff and Arthur D. Hayden is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 20th day of November, 1928.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 4903. Arthur D. Hayden, appellant, vs. International Banking Corporation. Court of Appeals, District of Columbia. Filed Jan. 9, 1929. Henry W Hodges, clerk.

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COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

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Henry W. Hodges
clerk,

IN THE
Court of Appeals, District of Columbia

No. 4903.

ARTHUR D. HAYDEN, *Appellant*,
vs.
INTERNATIONAL BANKING CORPORATION, *Appellee*.

BRIEF FOR APPELLANT.

JESSE C. ADKINS,
FRANK F. NESBIT,
LUCIEN H. MERCIER.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

JUDGE D. LAWRENCE GRONER
UNITED STATES COURT OF APPEALS
WASHINGTON, D. C.

IN THE
Court of Appeals, District of Columbia

No. 4903.

ARTHUR D. HAYDEN, *Appellant*,
vs.
INTERNATIONAL BANKING CORPORATION, *Appellee*.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

On November 15, 1920, appellee held appellant's demand notes aggregating \$6,511.33, on which interest had accrued in the amount of \$945.56. Appellant thereupon gave appellee his demand note of that date for the sum of \$7,456.89, with interest thereon at the rate of 8 per cent per annum (thereby compounding the interest). (Rec. p. 5.)

On August 17, 1926, appellee brought suit on the note, and appellant pleaded thereto the Statute of Limitations. By replication, appellee set up that appellant had acknowledged in writing and promised to

pay the indebtedness within three years next preceding the commencement of the suit. (Rec. pp. 1-3.)

The case was submitted below on stipulation as to facts, which said stipulation waived trial by jury; and the submission was made on the one issue, *i. e.*, whether appellant had acknowledged in writing and promised to pay the indebtedness within three years next preceding the commencement of the suit.

The stipulation was to the effect that the several letters, seventeen in number, which were thereto attached, were correct copies of the correspondence which passed between the parties; the first two letters being in 1920, the date the note was given; and the balance, fifteen in number, being dated from June, 1925, to May, 1926. All of said letters were by the stipulation offered as evidence on behalf of appellee, and objected to, severally and as a whole, by appellant on the ground that none of them tended to prove that appellant had acknowledged the debt sued for, and promised to pay the same, in writing, within three years of the bringing of the suit. (Rec. pp. 3-4.) (The letters are reproduced on pages 4 to 12 of the Record.) This correspondence, so introduced by stipulation, was the only evidence in the case.

On these letters, the Court below found and determined as a matter of law that appellant within three years next preceding the filing of suit, had so acknowledged the debt as to take the case out of the operation of the Statute of Limitations. (Rec. p. 12.)

STATEMENT OF EVIDENCE.

The following are the excerpts from the correspondence which appellee claims remove the bar of the Statute:

“I am not in a position to do more than abide by the understanding arrived at at the time of the consummation of this loan originally, and which was for the paying off of the loan by the application of the entire dividends received from the stock (left as collateral) until such time as the loan might be liquidated.” (Letter, Sept. 17, 1925; Rec. p. 6; insert in parentheses by counsel.)

“The International Banking Corporation does hold a note of mine * * * and I am calling upon them today with regard to same * * *.” (Letter Jany. 4, 1926; Rec. p. 8.)

“I am continuing my efforts towards the consummation of a sale of property, which, if consummated, will simplify my position considerably.

“In any event I shall call upon you * * * with the object of arranging with you about my note on the best terms possible.” (Letter Jany. 28, 1926; Rec. p. 10.)

That he would try to see them as soon as he returned to the city “with regard to my note.” (Letter, Feb. 23, 1926; Rec. p. 11.)

ASSIGNMENTS OF ERROR.

The Assignments of Error are:

(1) That the Court below erred in holding as matter of law, from the agreed facts, that appellant within three years next preceding the filing of suit, did so acknowledge the debt as to take the case out of the operation of the Statute of Limitations. (Rec. p. 13.)

(2) That the Court below erred in entering judgment for plaintiff. (Rec. p. 14.)

ARGUMENT.

The assignments bring up but one question, and that is, does the correspondence, from which the excerpts quoted above were taken, constitute such an acknowl-

edgment of the defendant's indebtedness from which a promise to pay could be inferred to remove the bar of the Statute of Limitations?

This question, it is believed, has been thoroughly and definitely answered in the negative by the authorities.

The general principles of law governing are fully set forth in the leading case of *SHEPHERD V. THOMPSON*, 122 U. S. 231, which was brought to the United States Supreme Court on error from the District of Columbia. This case contains an exhaustive review of the decisions to its date, both English and American, and in its opinion, the Court said:

“The statute of limitations is to be upheld and enforced, not as resting only on a presumption of payment from lapse of time, but, according to its intent and object, as a statute of repose. The original debt, indeed, is a sufficient legal consideration for a subsequent new promise to pay it, made either before or after the bar of the statute is complete. But in order to continue or to revive the cause of action, after it would otherwise have been barred by the statute, there must be either an express promise of the debtor to pay that debt, or else an express acknowledgment of the debt, from which his promise to pay it may be inferred. *A mere acknowledgment, though in writing, of the debt as having once existed, is not sufficient to raise an implication of such a new promise.* To have this effect, there must be a distinct and unequivocal acknowledgment of the debt as still subsisting as a personal obligation of the debtor.”

In another leading case *BELL V. MORRISON*, 1 Pet. 351, Mr. Justice Story fully discussed the general

principles, and after dwelling on the importance of giving the Statute of Limitations such support as to make it “what it was intended to be, emphatically, a statute of repose,” and “not designed merely to raise a presumption of payment of a just debt, from lapse of time,” said:

“If the bar is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate; and, if any conditions are annexed, they ought to be shown to be performed. If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous, subsisting debt, which the party is liable and willing to pay. *If there be accompanying circumstances, which repel the presumption of a promise or intention to pay*; if the expressions be equivocal, vague and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways; we think they ought not to go to a jury as evidence of a new promise to revive the cause of action.” (p. 362.)

The general principles to be deduced from these leading cases then come to this:

(a) There must be either an express promise to pay; or,

(b) A promise presumptively raised by law from a direct, unconditional, unqualified admission of a previous subsisting debt; devoid of any circumstances repelling such presumption.

POINT I.

There Was No Express Promise to Pay.

It is obvious that there is no express promise to pay included in the foregoing excerpts; and, therefore, the promise needed to remove the bar, if there be one, must be one raised by implication of law from a direct, unqualified admission of a previous subsisting debt, devoid of any circumstances repelling such presumption.

POINT II.

No Implied Promise Could be Raised from Any Acknowledgment in This Case.

The note involved in this case was dated in 1920; and the first letter relied on is dated in 1925, during which interval nothing whatever passed between the parties. The Statute of Limitations, therefore, had set up its bar in 1923 (Code, D. C. 1265); and that bar was effectual against the action brought in 1926, unless appellant *expressly, directly, and unequivocally acknowledged* the debt *as still due*, from which a promise to pay may be inferred. The alleged acknowledgments were made in 1925.

The decision of this, as well as any other cause involving an acknowledgment relied on to toll the Statute, must rest on the words used, interpreted in the light of surrounding circumstances, and of the general principles of law.

Passing now to the consideration of cases involving the construction of the words of acknowledgment relied on to toll the Statute, we come, first, to the case of CLEMENTSON V. WILLIAMS, 8 Cranch, 72, 74,

which was heard on error from this District. In this case, upon being shown an account barred by the Statute, one of two partners stated that

“the said account was due, and he supposed it had been paid by the defendant, but had not paid it himself, and did not know of its ever being paid.”

Holding that this acknowledgment was insufficient to take the account out of the Statute, Mr. Chief Justice Marshall said:

“The statute of limitations is entitled to the same respect with other statutes, and ought not to be explained away. In this case there is no promise, conditional or unconditional; but a simple acknowledgment. This acknowledgment goes to the original justice of the account; but this is not enough. The statute of limitations was not enacted to protect persons from claims fictitious in their origin, but from ancient claims, whether well or ill founded, which may have been discharged, but the evidence of discharge may be lost. It is not then sufficient to take the case out of the act, that the claim should be proved or be acknowledged to have been originally just; the acknowledgment must go to the fact that it is still due.”
8 Cranch, 74.

In *MOORE V. BANK OF COLUMBIA*, 6 Peters 84, 92, which also came up on error from this District, defendant, upon some bantering as to his independent circumstances, and his being so clear of debt or of the banks said:

“Yes, excepting one damned five hundred, in the Bank of Columbia, which I can pay at any time.”

Holding that this was not a sufficient acknowledgment from which a promise to pay could be inferred, the Court, after reviewing the general principles set forth in *BELL V. MORRISON* and *CLEMENTSON V. WILLIAMS*, *supra*, said:

“If the doctrine of this court, as laid down in the cases I have referred to, is to govern the one now before us, the facts and circumstances given in evidence fall very far short of taking the case out of the statute of limitations. There is no direct acknowledgment of a present subsisting debt; no express promise to pay; nor any circumstances from which an implied promise may fairly be presumed. The declarations of the defendant below were vague and indeterminate, leading to no certain conclusion, and at best, to probable inference only; * * * nor is there any direct admission of a present subsisting debt due. The epithet which accompanied the declaration, would well admit of a contrary conclusion; and that there were some circumstances attending it, that would lead him to resist payment. The assertion of his ability to pay, is no promise to pay. The whole declarations, taken together, do not amount either to an explicit promise to pay, made in terms unequivocal and determinate, or disclose circumstances from which an implied promise may fairly be presumed; one or the other of which this court has said is necessary to take the case out of the statute.”

In *SHEPHERD V. THOMPSON*, *supra*, also a case from this District, the statement relied on to remove the bar was contained in a written assignment by the defendant pledging a certain claim, the proceeds thereof, and the moneys to be derived therefrom “in consideration of the indebtedness described in the (de-

fendant's) deed of trust to William Thompson" "to the payment of said indebtedness."

Holding that this was not a sufficient acknowledgment, the United States Supreme Court, after reviewing the authorities cited above, and numerous other authorities, in America and England, said:

"In the light of the principles established by the authorities above referred to, it is quite clear that the instrument signed by the defendant on June 21, 1877, did not take the plaintiff's debt out of the statute.

"This instrument contains no promise of the defendant personally to pay that debt, and no acknowledgment or mention of it as an existing liability. It begins with a reference, by way of consideration only, to the original debt, designating it as 'the indebtedness described in the deed of trust' executed to the plaintiff at the time when that debt was contracted. Then follows a pledge of a certain claim of the defendant against the government, and its proceeds, to secure the payment of 'said indebtedness, with interest thereon at the rate of eight per cent per annum until paid.' This interest is mentioned, not as part of the consideration, or of the original debt, or as anything for which the defendant is liable, but only as something to the payment of which the claim pledged shall be applied. And the instrument concludes with a promise of the defendant that the proceeds of the claim pledged shall 'be applied to the payment of said indebtedness, with interest as aforesaid, or to so much thereof as the sum or sums of money so received is or are sufficient to pay.'

"Although the old debt is expressly called, as it is in law, the consideration for the new agreement, and not the old debt, is the measure of the plaintiff's right. The provisions for the payment of the debt and interest out of a particular fund ex-

clude any implication of a personal promise to pay either. The whole instrument clearly evinces the defendant's intention in executing it to have been that the property pledged should be applied, so far as it would go, to the payment of the debt and interest, and not that his own personal liability should be increased or prolonged in any respect.

“To imply from the terms of this instrument a promise of the defendant to pay the debt himself would be, in our opinion, to construe it against its manifest intent, and to fritter away the statute of limitations.”

The general principles of law as set out, and the rule of decision announced in the cases herein cited were approved by this court in,

RUPPERT V. BEAVANS, 2 App. D. C. 298
 BEAN V. WHEATLEY, 13 id. 473, 480
 HORNBLLOWER V. GEORGE WASHINGTON UNIVERSITY, 31 id. 64, 73, and
 GREEN V. REEVES, 47 id. 86

In RUPPERT V. BEAVANS, BEAN V. WHEATLEY, and GREEN V. REEVES, *supra*, there were clear, unequivocal acknowledgments of and promises to pay the debts sued for; and they were of course held to remove the bar.

In HORNBLLOWER V. GEORGE WASHINGTON UNIVERSITY, *supra*, the defendant had written plaintiff that his claim had been referred by its executive committee to a person named for adjustment. This Court, following the principles above outlined, held that this was not such an acknowledgment of indebtedness and promise of payment as would revive an obligation barred by the statute of limitations.

There are two other cases in this court on the question, *FLANNERY V. MAINE RED GRANITE CO.*, 3 App. D. C. 395, and *STRONG V. ANDROUS*, 34 id. 278; but in both there was an express promise to pay; and the decisions were rendered without reference to leading cases.

The Federal Courts, other than this, have had occasion to construe acknowledgments relied on to toll the Statute of Limitations. Their decisions might not be controlling; but, as none of the cases herein cited contain acknowledgments in form closely similar to those relied on here, the Federal cases cited below should be greatly persuasive, especially as the decisions are based on the above leading cases.

In *In re McGUIRE-HANLEIN*, 132 Fed. 394 (D. C. Ala. 1904) the Court held, after reviewing the *BELL-MORRISON* and *SHEPHERD-THOMPSON* cases, *supra*, that a writing

“Due A. Docovitch
 Jan. 12, 1892 \$5000;
 May 15, 1893 \$3000;
 June 11, 1894, \$2500;
 “Value Received
 “McGuire-Hanlein,
 “Sept. 1, 1898”

was not a sufficient acknowledgment from which a promise to pay could be implied to remove the bar of the statute.

In *BULLION & EXCHANGE BANK V. HEGLER*, 93 Fed. 890 (Cir. Ct. Cal.) suit was brought in 1897 on a note due in 1894, and against which the Statute of Limitations had run in 1896. The case arose in California, and the code provision with reference to a new

promise or acknowledgment is identical with ours. The defense was the Statute of Limitations, and plaintiff relied on a new promise. In support of its position, plaintiff introduced letters written by itself and its lawyer to defendant, and defendant's replies thereto. These replies are almost identical with those in the instant case and are as follows:

“Have neglected answering your letter calling my attention to note and interest due for the reason that I expected to see Mr. Williams and to talk with him about it. But have not seen him. Beg to say that I cannot pay the note or interest time, nor until I can turn some realty or other property into cash, which seems impossible to do at present.”

About a month later, defendant, in response to two letters from plaintiff's attorney, wrote:

“Yours of the 11th and 30th ult. reached me nearly at the same time, the former having followed me to the North and return. I penciled you a few lines on receipt just as I was leaving the city. Referring to the notes, I don't see any chance for me to pay anything on them just now, nor for certain until I can sell some realty. When I can do this, I can pay you at least a part. You may remember our talk on this matter on a former occasion. I saw Mr. Williams not long ago. Had quite a talk with him then. But he kindly did not remind me of my notes.”

In passing upon these letters, the court reviewed the leading cases of *BELL V. MORRISON*, and *SHEPHERD V. THOMPSON*, *supra*, and held:

“There is an acknowledgment in both of these letters that the defendant is indebted to the plaintiff; but in neither case is it an acknowledgment from which a promise to pay the debt can be inferred. In other words, it is not an unqualified acknowledgment, since it is accompanied with the condition that he cannot pay, or he does not see any chance to pay, unless he can turn some realty or other property into cash; and there is no evidence that this condition has been reached.”

In *FIRST NATIONAL BANK V. PRAY*, 288 Fed. 675 (C. C. A. 9th Cir.) plaintiff relied, in support of its suit on notes of defendant brought after the bar of the Statute of Limitations, on some letters written to it by defendant before and after the bar of the statute. The letters were many, and the principal one relied on was, as follows:

“ ‘Referring to your recent correspondence in regard to the White Stores notes, I have just to-day received a letter from Courtney & Courtney, attorneys at Duluth, saying that there was in the hands of trustee considerable amount for distribution to the creditors of that company, and the distribution would soon be made. When this is done, I should be very glad to hear from you again. Please understand I do not wish to stall this matter off, but believe it is only proper to apply the distribution which you receive on these notes before making settlement.’ ”

Holding there could be no implied promise raised by law, the Court said:

“Plaintiff contends that defendant’s letters of November 26, 1918, and December 11, 1918, are such acknowledgments, because they refer to the

note and do not repudiate the debt. Plaintiff contends that the letters are either an acknowledgment or a repudiation of the debt; that there can be no middle ground. But the statute, as construed by the Supreme Court of the state, following a decision of the Supreme Court of the United States by Mr. Justice Story in *Bell v. Morrison*, 1 Pet. 351, 362, 7 L. Ed. 174, requires an acknowledgment of the liability to pay and a willingness to pay. In the latter case, the Supreme Court of the United States, speaking through Mr. Justice Story, said:

“ ‘If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous, subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances which repel the presumption of a promise or intention to pay; if the expressions be equivocal, vague, and indeterminate, leading to no certain conclusions, but at best to probable inferences, which may affect different minds in different ways—we think they ought not to go to a jury as evidence of a new promise to revive the cause of action. Any other course would open all the mischiefs against which the statute was intended to guard innocent persons, and expose them to the dangers of being entrapped in careless conversations, and betrayed by perjuries.’

“We think the correspondence relating to the application of the dividends from the bankrupt estate of the principal on the note, and the absence of any direct, unqualified, and unconditional acknowledgment or promise to pay the finally ascertained balance, if any, answers all plaintiff’s contentions. It was said, further, in *Bell v. Morrison*, *supra*, that:

“ ‘Nice refinements for the purpose of evading the statute, * * * must be disregarded.’ ”

“Further discussion of the detail of this correspondence seems unnecessary. The Motion for nonsuit was properly granted.”

In *RAHILLY V. O’LAUGHLIN*, 1 Fed. (2d) 1, (C. C. A. 8th Cir.) plaintiff brought suit on notes long since barred by the Statute of Limitations, relying on written acknowledgments, etc., to toll the bar of the Statute. The code provisions involved were identical with ours. The written acknowledgments relied on were two letters, as follows:

“ ‘Williston, N. Dak., May 13, 1922.

“Mr. Patrick H. Rahilly, Lake City, Minn.

—Dear Sir: Your letter received. I remember the promise made you to pay some of my indebtedness. But the years that this country has gone through has left me poorer than when I came to it. However, I intend to pay some of this debt, as soon as I can get enough ahead to do so. But I cannot make any promise as to time now. But I will pay all I can without fail. I had no interest whatever in my brother’s Frank’s business here.

“Yours truly, (signed) M. O’Laughlin.’ ”

“ ‘Williston, N. Dak., June 11, 1922.

“P. H. Rahilly, Lake City, Minn.—Dear Sir: Your letter received. I notice all you say in it. When I am able to do something on that old affair, it will be done voluntarily. And I hope this time is not far off. I do not see where law will hurry this matter, as I will do all I can without it.

“Yours truly, (signed) M. O’Laughlin.’ ”

The Court, after a thorough and able review of the decided cases, *supra*, on the subject, held these letters were not sufficient, and said:

“Are these letters sufficient to remove the bar of the statute?

* * * * *

“A number of fundamental propositions are amply sustained by these federal authorities, which can be applied as tests in the case at bar. They may be summarized as follows: To sustain a new action on an old indebtedness barred by the statute of limitations there must be a new promise to pay or an acknowledgment from which a new promise is clearly implied. If conditions are annexed to an express promise, it must be shown that they have been performed. The promise to pay must be direct, clear, definite, explicit—not vague, equivocal, or uncertain. An acknowledgment of the debt to supply an inference of promise to pay must be distinct and unequivocal, as of a debt still subsisting as a personal obligation of the debtor and as one that he intends to pay.

* * * * *

“These letters, construed together, certainly do not contain any clear and distinct promise to pay the notes sued on. They refer to indebtedness, but do not specify the indebtedness, nor are they such acknowledgment of the particular indebtedness as to raise any implication that O’Laughlin intended to pay these notes. Whatever the indebtedness was, the implication would be that he did not intend to pay all of it, because he expresses his intent as being to pay only ‘some of this debt.’ If any of the expressions of either letter could be construed as a conditional promise, as plaintiff in error contends, and that the agreement is to pay when he gets ‘enough ahead to do so,’ then it is incumbent to show that he had ‘enough ahead to do so,’ and while some attempt is made to show that he received some part of his brother’s estate, the record is insufficient to show that he had enough ahead when suit was brought

to pay the debt in question. It would be a straining of language to hold that these letters were sufficient to show a new promise to pay, or such an acknowledgment as to imply such new promise. Indeed, the letters taken together show that he did not intend to commit himself to any definite promise to pay.

“The conclusion of law of the court that these letters were too uncertain and indefinite as to debt, amount, and time of payment to set aside the bar of the statute of limitations was correct, and the judgment of the trial court is affirmed.”

And, finally, appellant calls attention to the state case of *ASTON V. ASTON*, 188 Ill. App. 12, wherein the statement relied on was strikingly similar, if not the same, as that contained in the instant case. The defendant stated:

“With regard to the notes * * * I will go over as soon as I can, and we will fix it up.”

The Court held that this statement clearly did not constitute a sufficient acknowledgment to toll the Statute of Limitations.

And see, *Re FARRELL'S EST.*, 44 Pen. Sup. Ct. 474.

KRUEGER V. KRUEGER, 7 L. R. A. 72
(Texas Supreme Ct.).

“I have done my best to raise some money, but I cannot do it now * * * But some money we will send you, but not all, because we must live first. * * * I will pay you some every year, but whenever I can.”

BRAITHWAITE V. HARVEY, 27 L. R. A. 101
(Montana Supreme Ct.).

“Whatever is due is ready, as it has been for the last seven years, whenever I can safely pay you.”

CONCLUSION.

It is submitted that the statements herein are clearly insufficient to remove the bar, in that :

(1) They do not admit an obligation as subsisting at the time of making the statement ;

(2) The statements are not unequivocal, unqualified and unconditional, and do not express a willingness or intention to pay.

JESSE C. ADKINS,
FRANK F. NESBIT,
LUCIEN H. MERCIER.

